

1-1-1992

Strickland v. Washington: Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?

Richard P. Rhodes, Jr.

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/twlj>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Richard P. Rhodes, Jr., *Strickland v. Washington: Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. Third World L.J. 121 (1992), <http://lawdigitalcommons.bc.edu/twlj/vol12/iss1/7>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

STRICKLAND v. WASHINGTON: SAFEGUARD OF THE CAPITAL DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

I. INTRODUCTION

The Sixth Amendment to the United States Constitution confers upon each defendant in all criminal trials the right to "Assistance of Counsel for his defence."¹ Courts have acknowledged a defendant's right to this assistance for over a century. In *State v. Lewis*,² for example, the prosecution charged the defendant with first degree murder.³ After the court denied the defendant's motion for a continuance, his counsel withdrew from the case, leading the court to appoint counsel for him.⁴ Counsel had to prepare the defendant's murder defense hastily, without the benefit of a time extension, and ultimately were unable to present key witnesses whose testimony could have exonerated the defendant.⁵ The Missouri Court of Appeals reversed the murder conviction,⁶ finding that the defendant's new counsel did not have a reasonable time period—only six days—to secure testimony of these witnesses, who were located elsewhere in the state.⁷ In affirming this reversal, the Supreme Court of Missouri, which referred to the defendant as "an ignorant colored man,"⁸ held that former counsel had betrayed the defendant, and that the trial court had perpetrated a "gross injustice"⁹ in refusing to grant the continuance.

Recently, however, the United States Supreme Court has addressed the constitutional mandate that such counsel be effective. In *Gideon v. Wainwright*,¹⁰ the Supreme Court held that criminal defendants at both the state and federal levels enjoy a right to counsel guaranteed by the federal and state constitutions.¹¹ The notion that such counsel need be "effective" to fulfill the constitu-

¹ U.S. CONST. amend. VI.

² 9 Mo. App. 321 (1880), *aff'd*, 74 Mo. 222 (1881).

³ 9 Mo. App. at 322.

⁴ *Id.*

⁵ *Id.* at 323.

⁶ *Id.* at 326.

⁷ *Id.* at 325–26.

⁸ *State v. Lewis*, 74 Mo. 222, 227 (1881).

⁹ *Id.*

¹⁰ 372 U.S. 335 (1963).

¹¹ *Id.* at 344 (Court extended Sixth Amendment guarantee of counsel to State prosecutions, thereby establishing right of indigents to representation).

tional requirement first appeared in *McMann v. Richardson*.¹² In *McMann*, the Court declared that "defendants facing felony charges are entitled to the effective assistance of competent counsel."¹³ Although recognizing the need for effective and competent defense counsel, the *McMann* Court neglected to set a standard by which to determine the competence of an attorney's representation. The *McMann* Court preferred to leave the determination of defense counsel's competence "to the good sense and discretion of the trial courts."¹⁴ This entrustment of discretion fostered the development of numerous conceptions of "effective" counsel.

When viewed in the light of a capital proceeding, however, the task of defining "effective assistance of competent counsel" takes on a whole new meaning: it becomes a decision of life and death magnitude. For the defendant facing execution, "[t]he door is open, but only for cases of grievous deficiency and where the court has serious misgivings that justice has not been done."¹⁵ The state and federal appeals courts' analyses must take into account the Supreme Court's acknowledgment that capital sentencing stands apart from noncapital matters.¹⁶ Furthermore, in a capital context, the State must impose punishment on a principled, consistent basis, and with a greater degree of reliability than noncapital punishment.¹⁷

Nevertheless, the Supreme Court, by relying on various lower court standards in judging ineffective assistance of counsel, has actually complicated the exercise of the capital defendant's Sixth Amendment right. In *Strickland v. Washington*,¹⁸ decided in 1984, the Court first attempted to establish a uniform standard for determining when defense counsel had functioned ineffectively.¹⁹ The

¹² 397 U.S. 759 (1970).

¹³ *Id.* at 771 (emphasis added); see also *Rhee v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 69-70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell v. Alabama*, 287 U.S. 45, 56-57 (1932).

¹⁴ *McMann*, 397 U.S. at 771.

¹⁵ See *United States v. Decoster*, 624 F.2d 196, 214 (D.C. Cir. 1979) (en banc).

¹⁶ *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (per curiam) (Stewart, J., concurring); see also *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion).

¹⁷ See *Enmund*, 458 U.S. at 797-98; *Eddings*, 455 U.S. at 111-12; *Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 305; *Furman*, 408 U.S. at 306-10 (Stewart, J., concurring).

¹⁸ 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984).

¹⁹ Michael P. O'Brien, Note, *Judicial Jabberwocky or Uniform Constitutional Protection? Strickland v. Washington and National Standards for Ineffective Assistance of Counsel Claims*, 1985 UTAH L. REV. 723, 723 (1985).

Strickland Court, in denying the appeal of a Florida capital defendant, articulated a two-pronged test that defendants must fulfill to establish their counsels' ineffectiveness.²⁰ First, defendants must prove that their counsels' representation was deficient; second, defendants must show that the deficient performance deprived them of a fair trial by prejudicing the defense.²¹ On the one hand, the *Strickland* Court ostensibly established a uniform standard of review of ineffective assistance claims. On the other, the Court eviscerated its own decision by furnishing vague guidelines to govern a lawyer's actions and by allowing the trial courts' broad discretion in developing their own standards for addressing problems arising at trial.²²

This note focuses on the negative impact that the *Strickland* standard has had on ineffective assistance of counsel challenges brought by defendants in both state and federal courts. Has the *Strickland* standard safeguarded capital defendants' rights to effective assistance of counsel by providing a clear, uniform standard for trial courts to implement? Or has *Strickland* further disadvantaged capital defendants, not only by encouraging trial courts to continue to apply their own regional standards, but also by increasing the burden of proof upon these defendants in establishing their ineffectiveness claims? This note attempts to answer these questions by focusing on three issues. Part II treats the range of standards that courts utilized to determine counsel effectiveness during the years preceding *Strickland v. Washington*. Part III discusses the arrival of the *Strickland* standard, including a brief explanation of its components. Part IV examines post-*Strickland* legal developments, focusing on the problems the standard poses for capital defendants and how it has impacted those defendants attempting to challenge the effectiveness of their counsel in the state courts of the South.²³ This note concludes that, instead of safeguarding the capital defendant's right to effective assistance of counsel by providing a uniform national standard of review, the *Strickland* Court, through its reticence to declare such a forceful standard, has actually disadvantaged these defendants.

²⁰ 466 U.S. at 667.

²¹ *Id.*

²² Marianne Lavelle & Marcia Coyle, *Fatal Defense*, NAT'L L.J., June 11, 1990, at 42.

²³ Most notably, the so-called "death belt" States of Alabama, Florida, Georgia, Louisiana, and Texas, and on the federal level, the Fifth and Eleventh Circuits, which handle the largest amount of capital cases in the federal system. *See id.*

II. STANDARDS FOR MEASURING INEFFECTIVENESS OF COUNSEL PRIOR TO *STRICKLAND v. WASHINGTON*

A. *The Evolution of the Defendant's Constitutional Right to Counsel*

The concept of execution, as well as its practical application, has existed in North America as far back as 1622, when Daniel Frank became the first colonist to be lawfully executed for the offense of theft.²⁴ A defendant's right to effective assistance of counsel, however, has evolved primarily over the last century. Initially, the Supreme Court only recognized a defendant's constitutional right to obtain counsel.²⁵ Not until 1932, in *Powell v. Alabama*,²⁶ did the Court address the scope of the right to counsel conferred by the Sixth Amendment. The Court mandated that when defendants cannot furnish their own defense—because of “ignorance, feeble mindedness, illiteracy, or the like”—the State has the duty to provide them with counsel.²⁷ The Court recognized the provision of counsel as part of the Fourteenth Amendment, thereby incorporating it as an integral part of procedural due process.²⁸ By buttressing the defendant's right to counsel with the force of both the Sixth and Fourteenth Amendments, the *Powell* Court stressed the fundamental importance of the right to counsel in assuring fairness for defendants in federal and state prosecutions.²⁹ The Court subsequently included indigent defendants standing trial for felonies in the group entitled to this right to counsel, while allowing them to waive such right, if they did so “freely and intelligently.”³⁰

²⁴ HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 3 (1982).

²⁵ See, e.g., *Andersen v. Treat*, 172 U.S. 24, 29–31 (1898).

²⁶ 287 U.S. 45 (1932).

²⁷ *Id.* at 71.

²⁸ *Id.*

²⁹ *Id.* at 68, 73; see also *Maine v. Moulton*, 474 U.S. 159, 168–69 (1985) (“right to the assistance of counsel guaranteed by Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice”); *Coleman v. Alabama*, 399 U.S. 1, 7–10 (1970) (indigent defendant constitutionally entitled to counsel at preliminary hearing as well as trial); *Reynolds v. Cochran*, 365 U.S. 525, 526–33 (1961) (court's refusal to grant continuance until defendant's counsel arrived constituted denial of due process); *Williams v. Kaiser*, 323 U.S. 471, 473–74 (1945) (State's failure to appoint counsel violated defendant's Fourteenth Amendment right). But see *Foster v. Illinois*, 332 U.S. 134, 136–37 (1947) (Sixth Amendment's absolute guarantee of counsel is not made applicable to States via Fourteenth Amendment).

³⁰ *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (citing *Patton v. United States*, 281 U.S. 276, 308 (1930)); see also *Fay v. Noia*, 372 U.S. 391, 438–40 (1963) (capital defendant's failure to appeal conviction is not an intelligent and understanding waiver of his right to appeal if not resulting from consultation with competent counsel); *Moore v. Michigan*, 355 U.S. 155,

The shortcomings of the Fourteenth Amendment analysis, however, soon fell under criticism from the legal community. Because the analysis focused on the overall fairness of the proceedings, courts deemphasized the specific performance of counsel.³¹ Acknowledging this analytical shortfall, the Court applied a narrower reading to the Sixth Amendment right to counsel in *Betts v. Brady*.³² In *Betts*, the Court asserted that Fourteenth Amendment due process did not confer specific Sixth Amendment guarantees upon the States in all cases.³³ Rather, the Constitution requires that the State provide counsel for indigent criminal defendants only when the denial of such counsel would "constitute a denial of fundamental fairness, shocking to the universal sense of justice."³⁴ In order to ascertain when such a denial occurred, the Court analyzed the totality of the facts of each individual case.³⁵ The Court thus shifted emphasis away from the overall fairness of the trial and focused instead on counsel's conduct. While reducing the number of situations in which the States had to provide counsel under the Sixth Amendment, the *Betts* Court also limited those situations that could give rise to claims of ineffective assistance of counsel.

*Gideon v. Wainwright*³⁶ marked the Court's return to the broader Fourteenth Amendment analysis. In directly overruling *Betts*, the Court held the Sixth Amendment right to counsel was a fundamental right essential to a fair trial.³⁷ *Gideon's* significance is multi-

161 (1957) (capital defendant's waiver of entitlement to counsel was not "intelligent and understanding" (citing *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 118 (1956))); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (defendant's waiver of jury trial and assistance of counsel must be free and intelligent choice).

³¹ See Joanne Legano, Comment, *The Effective Assistance of Counsel: Chance or Guarantee?*, 11 FORDHAM URB. L.J. 85, 87-88 (1982).

³² 316 U.S. 455 (1942).

³³ *Id.* at 461-62.

³⁴ *Id.* at 462.

³⁵ *Id.*

³⁶ 372 U.S. 335 (1963).

³⁷ *Id.* at 343-45; see also *Polk County v. Dodson*, 454 U.S. 312, 322 (1981) (State criminal defendants entitled to guidance of counsel at every step of proceedings); *Lewis v. United States*, 445 U.S. 55, 59 (1980); *Anders v. California*, 386 U.S. 738, 742 (1967) (Supreme Court continues to adhere to principle that Fourteenth Amendment makes Sixth Amendment's counsel guarantee obligatory on the States); *Berry v. New York*, 375 U.S. 160 (1963) (per curiam); *Banks v. Wainwright*, 375 U.S. 51 (1963) (per curiam); *Crews v. Wainwright*, 375 U.S. 50 (1963) (per curiam); *Barnes v. North Carolina*, 375 U.S. 28 (1963) (per curiam); *Newsome v. North Carolina*, 375 U.S. 21 (1963) (per curiam); *Pickelsimer v. Wainwright*, 375 U.S. 2, 3 (1963) (per curiam); *Baxley v. Wainwright*, 374 U.S. 508 (1963) (per curiam); *Palmer v. Wainwright*, 374 U.S. 507 (1963) (per curiam); *Holmes v. Wainwright*, 374 U.S. 506 (1963) (per curiam); *Herb v. Wainwright*, 374 U.S. 505 (1963) (per curiam); *Auflick v. Wainwright*, 374 U.S. 494 (1963) (per curiam); *Kovner v. Wainwright*, 374 U.S. 492 (1963)

faceted. By overruling *Betts* and invalidating that Court's refusal to extend the Sixth Amendment's guarantee of counsel, the *Gideon* Court utilized the Fourteenth Amendment to ensure that criminal defendants in state courts benefit from the same Sixth Amendment protection as their federal counterparts.³⁸ Furthermore, the more exacting Sixth Amendment focus of *Gideon* laid the foundation for the idea that guaranteed representation rise to a level of minimum effectiveness.³⁹ In 1970, the Court further built upon the notion of effective counsel in *McMann v. Richardson*,⁴⁰ by declaring that defendants facing felony charges deserve the effective assistance of competent counsel.⁴¹ A brief review of how various courts ensured "fundamental fairness" illustrates how differently such courts viewed the sufficiency of representation.

B. Various Court Approaches Toward Ensuring "Fundamental Fairness"

Almost a full century before *McMann*, appellate courts had recognized ineffective assistance claims.⁴² Such recognition, however, embodied an extremely rare use of judicial supervisory powers.⁴³ Courts subsequently tied the Fourteenth Amendment into their analyses. If a defendant's deprivation of effective assistance of counsel ultimately resulted in a fundamentally unfair proceeding, then the court would reverse a guilty verdict, considering it a due process violation.⁴⁴

This question of fundamental fairness led courts of the post-World War II era to examine whether the defense counsel's rep-

(per curiam); *Bryant v. Wainwright*, 374 U.S. 492 (1963) (per curiam); *Paige v. North Carolina*, 374 U.S. 491 (1963) (per curiam); *Laughner v. Wainwright*, 374 U.S. 489 (1963) (per curiam); *Davis v. Barmiller*, 374 U.S. 489 (1963) (per curiam); *Walker v. Walker*, 374 U.S. 488 (1963) (per curiam); *Huggins v. Raines*, 374 U.S. 105 (1963) (per curiam); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (defendant's right to counsel guaranteed by due process); *Buffington v. Wainwright*, 373 U.S. 543 (1963) (per curiam).

³⁸ See 372 U.S. at 342, 344.

³⁹ See *id.* at 344-45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). But see generally Stephen G. Gilles, Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380 (1983) (author contends that Supreme Court has not interpreted Sixth Amendment as mandating competent defense by counsel).

⁴⁰ 397 U.S. 759 (1970).

⁴¹ *Id.* at 771; see also *Follette v. Camacho*, 398 U.S. 279 (1970) (per curiam); *Parker v. North Carolina*, 397 U.S. 790, 797-98 (1970) (appointed counsel met the *McMann* standard of competence).

⁴² See, e.g., *State v. Gunter*, 30 La. Ann. 536, 540 (1878).

⁴³ Helen Gredd, Comment, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1550 (1983).

⁴⁴ *Id.*; see, e.g., *Lunce v. Overlade*, 244 F.2d 108, 110-11 (7th Cir. 1957).

resentation was so deficient as to render the proceeding a "farce or mockery" of justice.⁴⁵ The defendant had to prove that, during the course of the trial, counsel's representation—either through omissions, failure to call witnesses, insufficient preparation, and the like—was so incompetent as to render the proceedings invalid.⁴⁶

The "farce and mockery" standard emerged as the controlling standard in the federal courts.⁴⁷ This standard exemplified the prevailing notion that, except in the most egregious of circumstances, the verdicts of otherwise fair criminal proceedings should never serve a subordinate role to a defendant's ineffective assistance of counsel claim.⁴⁸

During the World War II years, the District of Columbia Circuit Court of Appeals espoused that the Sixth Amendment guaranteed only the appointment of counsel, not the appointment of effective counsel.⁴⁹ Thus, any federal defendant waging an ineffective assistance of counsel challenge had to allege a violation of the constitutional due process guarantee of a fair trial.⁵⁰ Eventually, the farce and mockery standard subsumed Sixth Amendment claims brought in federal court as well.⁵¹

The farce and mockery standard soon came under fire from courts, lawyers, and legal commentators. Critics called the standard "vague"⁵² and contested that it held lawyers to a lower standard of performance than other occupations.⁵³ By increasing the acceptable margin of attorney incompetence, the courts attenuated the link between appointed counsel and the due process guarantee of a fair

⁴⁵ *Id.*; see, e.g., *Diggs v. Welch*, 148 F.2d 667, 669–70 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945); James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 443–54 (1977).

⁴⁶ See, e.g., *United States ex rel. Scott v. Mancusi*, 429 F.2d 104, 109 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971) (conduct must "shock the conscience of the court and make the proceedings a farce and mockery of justice" (quoting *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950)); *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); *United States ex rel. Feeley v. Ragen*, 166 F.2d 976, 980–81 (7th Cir. 1948); *Diggs*, 148 F.2d at 670.

⁴⁷ J. Gregory Mermelstein, Note, *Ineffective Assistance of Counsel Claims: Toward a Uniform Framework for Review*, 50 MO. L. REV. 651, 656 (1985); see, e.g., *Beasley v. United States*, 491 F.2d 687, 693–94 (6th Cir. 1974).

⁴⁸ Mermelstein, *supra* note 47, at 656 (citing Harvey E. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 929 (1973)).

⁴⁹ See *Diggs v. Welch*, 148 F.2d 667, 668 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

⁵⁰ Mermelstein, *supra* note 47, at 656.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (citing William H. Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233, 238 (1979)).

trial. The standard also ignored the fact that the bulk of an attorney's work precedes the trial.⁵⁴ Most importantly, critics asserted that the farce and mockery standard placed an undue burden on defendants.⁵⁵ Not only did defendants have to establish counsel's ineffectiveness, but they also had to prove that this ineffectiveness converted the trial into a farce or mockery.⁵⁶

The Supreme Court, through its extension of the Sixth Amendment right to counsel to all indigent felony defendants in *Gideon*,⁵⁷ accelerated the abandonment of the farce and mockery standard.⁵⁸ Courts could not reconcile the standard's capriciousness with the quality of representation to which defendants were entitled.⁵⁹ By 1970, the District of Columbia Circuit Court of Appeals expressly invalidated the farce and mockery standard in *Scott v. United States*.⁶⁰ Courts subsequently devised new methods for determining counsels' ineffectiveness.

The District of Columbia Circuit Court of Appeals instituted the "gross incompetence" standard.⁶¹ If the defendant could establish that the gross incompetence of defense counsel precluded the mounting of an effective defense, then a sentence reversal would follow.⁶² Alternatively, in the 1970 case *Caraway v. Beto*,⁶³ the Fifth Circuit Court of Appeals interpreted the right to counsel as ensuring representation that would be reasonably likely to and does in fact provide effective counsel. In *Caraway*, the defendant, accused of armed robbery, received only one visit from appointed counsel, three days before standing trial.⁶⁴ During this visit—which lasted for only fifteen minutes—counsel not only failed to inquire if the defendant wanted to subpoena witnesses, but also neglected to object to irrelevant and prejudicial exhibits offered by the prosecution.⁶⁵ The Fifth Circuit affirmed the lower court's granting of a

⁵⁴ Erickson, *supra* note 53, at 239.

⁵⁵ Mermelstein, *supra* note 47, at 657.

⁵⁶ *Id.* (citing Robert J. Conflitti, Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AM. CRIM. L. REV. 29, 34 (1983)).

⁵⁷ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁵⁸ See *Bruce v. United States*, 379 F.2d 113, 116–17 (D.C. Cir. 1967) (farce and mockery standard deemphasized as valid constitutional standard).

⁵⁹ Bines, *supra* note 48, at 929–30.

⁶⁰ 427 F.2d 609, 610 (D.C. Cir. 1970).

⁶¹ *Id.*

⁶² *Bruce*, 379 F.2d at 116–17.

⁶³ 421 F.2d 636, 637 (5th Cir. 1970) (per curiam).

⁶⁴ *Id.*

⁶⁵ *Id.*

writ of habeas corpus, holding that counsel's conduct deprived the defendant of the effective assistance of counsel.⁶⁶

The demise of the farce and mockery standard did not lead to greater uniformity in defining effective counsel, however. While in *McMann* the Supreme Court emphasized the capital defendant's entitlement to the effective assistance of counsel,⁶⁷ it left the task of defining the parameters of such assistance to the circuit courts.⁶⁸ This resulted in a proliferation of diverse approaches. The United States Court of Appeals for the Fifth Circuit utilized one such approach, the "reasonably competent attorney rule," in *MacKenna v. Ellis*.⁶⁹ In *MacKenna*, the Fifth Circuit found that the State's appointment of two attorneys, neither of whom had practiced for more than five months, over the defendant's objections, coupled with the attorneys' flawed representation,⁷⁰ compromised the defendant's due process rights.⁷¹ The Fifth Circuit interpreted a criminal defendant's right to counsel not as a right to errorless counsel, or to counsel judged ineffective by hindsight, but to "counsel reasonably likely to render and rendering reasonably effective assistance."⁷²

In *Caraway*,⁷³ the Fifth Circuit held that attorneys could not provide reasonably effective assistance without taking adequate time to familiarize themselves with the law and circumstances of the case.⁷⁴ In so holding, the court paid special attention to the purpose of the adversary system: "to serve the ends of justice."⁷⁵ The failure of defense counsel to provide an intelligent and reasonable defense contravenes this purpose, thereby compromising the defendant's constitutional entitlement to a fair trial.

The Fifth Circuit applied the *MacKenna* standard in reversing a United States District Court for the Northern District of Texas denial of a habeas corpus petition in *Herring v. Estelle*.⁷⁶ The defendant in *Herring* escaped from prison when a guard left the jailhouse

⁶⁶ *Id.* at 637-38.

⁶⁷ *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

⁶⁸ *Id.*

⁶⁹ 280 F.2d 592 (5th Cir. 1960).

⁷⁰ Counsel failed to interrogate witnesses and ensure their presence at trial and failed to obtain a continuance. *Id.* at 600.

⁷¹ *Id.* at 599.

⁷² *Id.*

⁷³ *Caraway v. Beto*, 421 F.2d 636 (5th Cir. 1970) (per curiam).

⁷⁴ *Id.* at 637.

⁷⁵ *Id.*

⁷⁶ 491 F.2d 125 (5th Cir. 1974).

key in the prison door.⁷⁷ The defendant's counsel, appointed by the State on the day of the trial, urged him to plead guilty to a charge of armed robbery, which carried a sentence of twenty-five years.⁷⁸ Counsel never apprised his client of the opportunity to plead to a lesser charge in connection with the defendant's escape from the prison, which carried a seven year sentence.⁷⁹ In its decision for the defendant, the Fifth Circuit expressly discarded the farce and mockery standard⁸⁰ and applied the *MacKenna* "reasonably competent attorney" rule. The inferior preparation of defense counsel, manifested in his failure to recommend the pleading option, prevented the defendant from receiving reasonably competent representation.⁸¹

Inadequate preparation of counsel also led to the Fifth Circuit's reversal of a habeas corpus denial by the United States District Court for the Southern District of Georgia in *Baty v. Balkcom*.⁸² In *Baty*, defense counsel represented two codefendants charged with armed robbery.⁸³ Each defendant, however, adduced contradictory stories implicating the other in the crime.⁸⁴ On the day preceding trial, standby counsel assumed representation of defendant Baty, but failed to speak with the defendant until the following morning, shortly before trial.⁸⁵ In addition, defense counsel failed to read the preliminary hearing transcript and did not interview any witnesses.⁸⁶ The Fifth Circuit acknowledged that replacement counsel's lack of familiarity with the facts of Baty's case compromised the defendant's right to effective counsel.⁸⁷

A closer look at the numerous standards applied by the circuit courts of appeals reveals the patchwork approach of the federal court system toward defining "effective" counsel. By the early 1980s, the majority of circuits employed variants of the "reasonably effective assistance" standard. The First Circuit, for example, required

⁷⁷ *Id.* at 126.

⁷⁸ *Id.*

⁷⁹ *Id.* at 127.

⁸⁰ *Id.*

⁸¹ *Id.* at 129.

⁸² 661 F.2d 391 (5th Cir. Unit B Nov. 1981), *cert. denied*, 456 U.S. 1011 (1982).

⁸³ *Id.* at 392.

⁸⁴ *Id.*

⁸⁵ *Id.* at 392-93.

⁸⁶ *Id.* at 393.

⁸⁷ *Id.* at 394-95 (citing *Kemp v. Leggett*, 635 F.2d 453, 454-55 (5th Cir. Unit B Jan. 1981) (*per curiam*)); *Gaines v. Hopper*, 575 F.2d 1147, 1150 (5th Cir. 1978) (*per curiam*) (inadequate preparation of counsel is ground for finding violation of defendant's Sixth Amendment right).

that counsel provide "reasonably competent assistance."⁸⁸ In *United States v. Bosch*,⁸⁹ the court concluded that defense counsel's reference to the defendant's prior convictions stemmed from the attorney's neglect and ignorance.⁹⁰ Because this neglect and ignorance precluded counsel from engaging in "informed professional deliberation," the defendant suffered a deprivation of his right to effective assistance.⁹¹

The Second Circuit, in *Trapnell v. United States*,⁹² mandated that counsel provide "reasonably competent assistance." The *Trapnell* court denied a convicted hijacker's ineffective counsel claim.⁹³ Reluctant to second-guess trial strategy, the court held that counsel's failure to call three witnesses to substantiate the defendant's insanity defense did not compromise the representation's effectiveness.⁹⁴ The witnesses, despite their close contact with the defendant, would not be the best witnesses to testify as to the defendant's insanity.⁹⁵ In fact, the court noted, the defense attorney actually chose a more likely avenue of success by calling witnesses who had less contact with the defendant, but strongly confirmed his mental instability.⁹⁶

The nature of counsels' representation and their overall impact on the juries' verdicts distinguish *Trapnell* and *Bosch*. In *Bosch*, the defense attorney's unreasonable preoccupation with his own theories blinded him to the reality that his admission of his client's prior convictions had seriously prejudiced his case.⁹⁷ In *Trapnell*, however, the defense counsel consciously elected to call witnesses whom he felt were stronger to the defendant's case.⁹⁸ Although the insanity defense failed, the failure of a professionally reasonable and sound strategy decision did not in and of itself support a claim of ineffective assistance of counsel.⁹⁹

In *Dyer v. Crisp*,¹⁰⁰ the Tenth Circuit Court of Appeals also required "reasonably competent assistance."¹⁰¹ The presence of de-

⁸⁸ See *United States v. Bosch*, 584 F.2d 1113, 1122 (1st Cir. 1978).

⁸⁹ *Id.*

⁹⁰ *Id.* at 1122.

⁹¹ *Id.*

⁹² 725 F.2d 149, 153 (2d. Cir. 1983).

⁹³ *Id.* at 155.

⁹⁴ *Id.* at 156.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *United States v. Bosch*, 584 F.2d 1113, 1120 (1st. Cir. 1978).

⁹⁸ 725 F.2d at 156.

⁹⁹ *Id.*

¹⁰⁰ 613 F.2d 275 (10th Cir.) (en banc), cert. denied, 445 U.S. 945 (1980).

¹⁰¹ *Id.* at 278.

fense errors at trial did not constitute a prima facie Sixth Amendment violation.¹⁰² In *Dyer*, the Tenth Circuit interpreted the Sixth Amendment as guaranteeing counsel that "exercise[s] the skill, judgment and diligence of a reasonably competent defense attorney."¹⁰³

While the Tenth Circuit in *Dyer* began with a general standard of "reasonably competent assistance" and narrowed it to a more specific description involving "skill," "judgment," and "diligence," the Sixth Circuit Court of Appeals applied a much broader "reasonably effective assistance" standard in *Wilson v. Cowan*.¹⁰⁴ In that case, the defendant claimed that robbery victims had mistakenly identified him as he stood in a police lineup.¹⁰⁵ At trial, the defense attorney failed to call witnesses to substantiate the defendant's alibi.¹⁰⁶ This failure deprived the defendant of effective representation and led to the reversal of the conviction.¹⁰⁷ The Sixth Circuit noted that the effective assistance standard required representation that "is reasonably likely to render and does in fact render reasonably effective assistance under the particular facts and circumstances of the case."¹⁰⁸

The Ninth Circuit employed a vague standard in analyzing *Cooper v. Fitzharris*.¹⁰⁹ The court required "reasonably competent and effective representation."¹¹⁰ In *Cooper*, the failure of defense counsel to object to evidence obtained from a convicted rapist's home through warrantless police searches served as part of the foundation of the defendant's claim of ineffective counsel.¹¹¹ The court upheld the conviction, stating that when defendants base their claims upon identifiable acts or omissions by the defense attorney occurring during trial, they must also prove that these errors prejudiced the defense.¹¹² This notion of the defendant's double burden of proving ineffectiveness and prejudice would reappear with the arrival of *Strickland*.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 578 F.2d 166, 168 (6th Cir. 1978).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 167-68.

¹⁰⁷ *Id.* at 168-69.

¹⁰⁸ *Id.* (citing *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)).

¹⁰⁹ 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

¹¹⁰ *Id.* at 1328.

¹¹¹ *Id.*

¹¹² *Id.* at 1327.

On its face, the Tenth Circuit's "reasonably competent assistance" standard seems to define counsel's effectiveness, as it frames the definition within the parameters of the circumstances of each individual case. This assumption, however, requires a caveat. The Tenth Circuit's definition only dictates how to apply the standard; the standard itself contains the same vagueness as that of the Second and Sixth Circuits. The distinction is purely syntactic, substituting "competent" for "effective."

In *United States ex rel. Williams v. Twomey*,¹¹³ the Seventh Circuit Court of Appeals employed a "minimum standard of professional representation."¹¹⁴ In reversing an Illinois district court's denial of a habeas corpus petition, the Seventh Circuit found that defense counsel, by failure to seek a continuance to investigate the role of a codefendant in the alleged crime, fell short of the standard.¹¹⁵ The court reversed the denial and granted the habeas petition.¹¹⁶

In *United States v. Easter*,¹¹⁷ the Eighth Circuit Court of Appeals required defense counsel to exhibit "customary skills and diligence [of a] reasonably competent attorney."¹¹⁸ At trial, the defense counsel failed to challenge the legality of a police search of the defendant's property.¹¹⁹ The court considered this failure to be egregious enough to sustain the ineffective assistance claim and to vacate the robbery conviction.¹²⁰ In so holding, the court found that counsel's failure to act as a reasonably competent lawyer would under similar case circumstances was the dispositive factor.¹²¹ The *Easter* court, like the Sixth Circuit in *Wilson*, utilized a case-by-case approach in analyzing counsels' conduct. Once again, however, the court did little to clarify the nebulous "customary skills and diligence" component of the standard.¹²²

In the Eleventh Circuit, prior to *Strickland*, counsel had to be reasonably likely to and render effective assistance in fact, as seen in *Goodwin v. Balkcom*.¹²³ In *Goodwin*, the court found that a Georgia

¹¹³ 510 F.2d 634 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975).

¹¹⁴ *Id.* at 640.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 539 F.2d 663 (8th Cir. 1976).

¹¹⁸ *Id.* at 666.

¹¹⁹ *Id.* at 665.

¹²⁰ *Id.*

¹²¹ *Id.* at 666 (citing *Crismon v. United States*, 510 F.2d 356, 358 (8th Cir. 1975)).

¹²² *Id.* (Eighth Circuit states that a competent trial lawyer "should be able to properly prepare and defend a criminal case," but does not elaborate as to what this preparation entails).

¹²³ 684 F.2d 794 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983).

capital defendant's appointed counsel had not rendered such assistance.¹²⁴ The court noted that the defense attorney's failure to examine the procedures for jury selection prevented him from objecting to conspicuous racial and gender disproportions on the jury; additionally, his failure to investigate the defendant's case directly precluded a second defense.¹²⁵ Considered separately, these errors constituted poor judgment. When taken together, however, the court determined that they deprived the defendant of effective assistance of counsel.¹²⁶ The court set aside the death sentence and remanded for a new trial.¹²⁷

The Third and Fourth Circuit Courts of Appeals preferred the "normal competency"¹²⁸ and "checklist"¹²⁹ approaches, respectively. In the Third Circuit, in *Moore v. United States*,¹³⁰ defense counsel had to demonstrate a degree of professionalism equal to a standard of "normal competency."¹³¹ Counsel need not be extraordinary, merely competent enough so that the court would not have to intercede to correct incompetent assistance.¹³² Interestingly, the Third Circuit explicitly disregarded the prejudice requirement¹³³ set forth in the Ninth Circuit.¹³⁴ For the Third Circuit, "the ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency."¹³⁵

The Fourth Circuit's checklist approach ranked as the most detailed of all circuit court approaches.¹³⁶ The court's checklist approach required that defense counsel perform a list of duties, including providing sufficient time to prepare their defense before the commencement of the trial, investigating all leads thoroughly,

¹²⁴ *Id.* at 817. Counsel failed to examine jury selection procedures in the county before trial and did not probe sufficiently into the facts surrounding the defendant's arrest, precluding a probable cause defense. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 820.

¹²⁸ See *Moore v. United States*, 432 F.2d 730, 737 (3rd Cir. 1970).

¹²⁹ See *Marzullo v. Maryland*, 561 F.2d 540, 544-45 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

¹³⁰ 432 F.2d 730.

¹³¹ *Id.* at 737.

¹³² See *id.*

¹³³ *Id.*

¹³⁴ See *Cooper v. Fitzharris*, 586 F.2d 1325, 1327 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

¹³⁵ *Moore*, 432 F.2d at 737.

¹³⁶ Mermelstein, *supra* note 47, at 658.

apprising defendants of their rights, and meeting personally with the defendants as often as defense preparation required.¹³⁷ In *Marzullo v. Maryland*,¹³⁸ the Fourth Circuit reversed a denial of a habeas corpus petition.¹³⁹ It acknowledged that the application of specific professional standards¹⁴⁰ to the disputed conduct could assist in an effective appraisal of counsel's normal competence.¹⁴¹ The *Marzullo* court concluded that the defense counsel's failure to move to exclude the jury upon the dismissal of the state's first indictment, coupled with his waiver of peremptory challenges, placed his conduct "outside the range of competence expected of attorneys in criminal cases," and hence deprived the defendant of his constitutional entitlement to effective counsel.¹⁴²

In summary, until the 1980s, federal courts continued to apply their own particular standards for defining the effectiveness of counsel's assistance. In 1983, however, through its review of *Washington v. Strickland*,¹⁴³ the Eleventh Circuit formulated a modified standard. The Supreme Court's subsequent review of this case ranked as the first attempt by the Court to knit disparate state and federal standards together and establish uniformity in reviewing ineffectiveness claims.¹⁴⁴

III. THE ARRIVAL OF THE *STRICKLAND* STANDARD

A. *Strickland v. Washington*: Case History

The defendant in *Strickland*,¹⁴⁵ David Washington, faced charges of kidnapping and murder.¹⁴⁶ The State of Florida pro-

¹³⁷ See *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968).

¹³⁸ 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978).

¹³⁹ *Id.* at 541, 547.

¹⁴⁰ The court mentions precedents from State and federal courts, American Bar Association standards, and, in some cases, expert witness testimony. *Id.* at 544-45.

¹⁴¹ *Id.*

¹⁴² *Id.* at 547.

¹⁴³ 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), rev'd, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984). On Oct. 1, 1981, the Fifth Circuit of the United States Court of Appeals was divided into the new Fifth and Eleventh Circuits. This case was decided during the transitional period leading to this reorganization, and is properly cited as "5th Cir. Unit B." Currently, "5th Cir. Unit B" cases are binding only in the Eleventh Circuit. See Gredd, *supra* note 43, at 1544 n.1. This note adheres to the citation form of "5th Cir. Unit B," but in discussing the case, refers to the decision as one made by the Eleventh Circuit.

¹⁴⁴ O'Brien, *supra* note 19, at 723.

¹⁴⁵ 466 U.S. 668 (1984), reh'g denied, 467 U.S. 1267.

¹⁴⁶ *Id.* at 672.

vided the defendant with experienced counsel.¹⁴⁷ Acting against counsel's explicit advice, Washington voluntarily confessed and waived his right to an advisory jury.¹⁴⁸ Prior to the sentencing hearing, the appointed attorney did attempt to locate character witnesses to testify at the proceeding, but none ever appeared.¹⁴⁹ Furthermore, counsel also failed to request a psychiatric examination of the defendant.¹⁵⁰ As a result, the defense presented no mitigating evidence at the hearing, and Washington received the death sentence.¹⁵¹

Washington subsequently waged an unsuccessful ineffective assistance challenge of the conviction through the Florida court system and eventually filed a petition for habeas relief in federal district court.¹⁵² The district court also denied relief, on the grounds that although the defense attorney did err by not investigating the mitigating evidence more thoroughly, it was a harmless error, resulting in no prejudice to Washington's sentence.¹⁵³ On appeal, the newly formed Eleventh Circuit¹⁵⁴ decided to rehear the case.¹⁵⁵ The Eleventh Circuit, in analyzing and ultimately rejecting Washington's ineffective assistance of counsel claim, modified its previous reasonableness standard.¹⁵⁶ The Eleventh Circuit held that, in addition to proving that counsel failed to render effective assistance, defendants needed to establish that the deficient representation actually and substantially prejudiced their defense.¹⁵⁷ The Supreme Court's upholding of the Eleventh Circuit's modified standard in *Strickland* may have signaled the arrival of a uniform standard of review.

B. *The Two-Pronged Test for Ineffective Assistance of Counsel*

The Supreme Court upheld the Eleventh Circuit's two-pronged test for reversing capital sentences on the ground of ineffective

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (according to Fed. R. Civ. P. 39(c), a federal court may try a case with an advisory jury when no right to a jury trial exists. The verdicts of such juries do not bind the court. See BLACK'S LAW DICTIONARY 54 (6th ed. 1990)).

¹⁴⁹ *Strickland*, 466 U.S. at 673.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 675.

¹⁵² *Id.* at 678.

¹⁵³ *Washington v. Strickland*, 673 F.2d 879, 894-95, 900-01 (5th Cir. Unit B 1982), *reh'g denied*, 467 U.S. 1267 (1984).

¹⁵⁴ See *supra* text accompanying note 143.

¹⁵⁵ *Washington v. Strickland*, 679 F.2d 23 (5th Cir. Unit B 1982), *reh'g denied*, 467 U.S. 1267 (1984).

¹⁵⁶ *Washington v. Strickland*, 693 F.2d 1243, 1263-64 (5th Cir. Unit B 1982), *rev'd*, 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984).

¹⁵⁷ *Id.*

assistance of counsel.¹⁵⁸ First, defendants must establish that counsel's representation was "deficient."¹⁵⁹ Defendants satisfy this prong by showing errors committed by defense counsel that rise to such a serious level that they effectively deprive defendants of the counsel to which they are entitled under the Sixth Amendment.¹⁶⁰ Second, after establishing the deficiency of the representation, defendants must then prove that the deficiency prejudiced their defense.¹⁶¹

In using the reasonableness requirement for the first prong, the Supreme Court merely adopted the traditional test of the Fifth and Eleventh Circuits, focusing on the circumstances of each individual case.¹⁶² The Court required defendants to prove that their counsel's representation did not meet an "objective standard of reasonableness."¹⁶³ The Court had no problem justifying the vagueness of this "objective standard," stating that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms."¹⁶⁴ In addition to enumerating the fundamental duties counsel owed the criminal defendant—such as loyalty, and the duty to avoid conflicts of interest—the Court also suggested prevailing American Bar Association standards as guides to determining reasonableness.¹⁶⁵

Yet, while initially seeming receptive to an expanded and more detailed analysis of ineffective counsel claims, the Court tempered its opinion by forcing the defendant to overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."¹⁶⁶ The Court refused to use hindsight to scrutinize and regulate every tactical decision or judgment made by defense counsel.¹⁶⁷ The vague nature of the reasonableness component of the *Strickland* standard indicates the Court's reticence

¹⁵⁸ *Strickland*, 466 U.S. at 687.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 688; see, e.g., *Goodwin v. Balkcom*, 684 F.2d 794, 804 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983) (totality of circumstances); *Baty v. Balkcom*, 661 F.2d 391, 394 (5th Cir. Unit B Nov. 1981), *cert. denied*, 456 U.S. 1011 (1982) (reasonableness standard); *Washington v. Estelle*, 648 F.2d 276, 278–79 (5th Cir. Unit A June 1981), *cert. denied*, 454 U.S. 899 (1981) (reasonableness standard); *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. Unit A Apr. 1981) (totality of circumstances).

¹⁶³ *Strickland*, 466 U.S. at 688.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)).

¹⁶⁶ *Id.* at 689 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955) (defendant must overcome presumption that counsel's conduct is "sound trial strategy")).

¹⁶⁷ *Id.*

to intrude upon the attorney/client relationship.¹⁶⁸ The Court acknowledged that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way,"¹⁶⁹ and hence, it refused to force a predetermined strategy on every defense attorney. Furthermore, the Court applied a restrictive analysis of the Sixth Amendment as a whole, asserting that it is not the purpose of the effective assistance provision to ameliorate the quality of legal counsel; instead, the Sixth Amendment's overarching purpose is to insure that criminal defendants "receive a fair trial."¹⁷⁰

A closer reading of the *Strickland* opinion, however, reveals the Court's conservative viewpoint. On the one hand, the Court strictly interprets the Sixth Amendment as requiring counsel that will merely perform reasonably "under prevailing professional norms."¹⁷¹ Yet, the purpose for which said counsel exists, to provide the defendant with a fair trial,¹⁷² also constitutes a broader due process concern, which the *Strickland* Court fails to clarify.

C. Another Burden for the Defendant: The Harmless Error Rule

The second prong of the *Strickland* test, the prejudice requirement, departs from the traditional outcome-determinative method employed in death penalty cases.¹⁷³ Under the outcome-determinative test, defendants needed to demonstrate that their representation fell below acceptable standards to such an extent that it more likely than not affected the decision in the case.¹⁷⁴ This standard enabled the state to prevail if it could prove beyond a reasonable doubt that the alleged error(s) in question were "harmless," or did not influence either the defendant's conviction or sentencing.

The Supreme Court upheld a number of death sentences by employing this harmless error analysis prior to *Strickland*. In *Hopper v. Evans*,¹⁷⁵ a defendant received a death sentence for intentionally killing a robbery victim based upon a state statute that prohibited

¹⁶⁸ O'Brien, *supra* note 19, at 732.

¹⁶⁹ *Strickland*, 466 U.S. at 689.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 688.

¹⁷² *Id.* at 689.

¹⁷³ See Thomas Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition After Strickland*, 17 LOY. U. CHI. L.J. 203, 210-11 (1986).

¹⁷⁴ See *Chapman v. California*, 386 U.S. 18, 22 (1967); see also *United States v. Decoster*, 624 F.2d 196, 215 (D.C. Cir. 1979) (en banc).

¹⁷⁵ 456 U.S. 605 (1982).

jury instruction on a lesser offense.¹⁷⁶ The Court invalidated a similar statute in an earlier case, *Beck v. Alabama*,¹⁷⁷ reasoning that an uninstructed jury would arrive at an unjustified murder conviction.¹⁷⁸ Although the *Hopper* defendant's death sentence arose under a statute declared unconstitutional in *Beck*, the Court upheld both the conviction and the sentence.¹⁷⁹ The Court reasoned that a statute prohibiting instruction of the jury on a lesser offense violates the defendant's constitutional rights only when evidence exists that could reasonably result in a verdict of guilt for a lesser offense.¹⁸⁰ In so doing, the Court limited *Beck* to those cases in which such supporting evidence exists.¹⁸¹ In *Hopper*, the Court did not deem such evidence to exist, as the defendant's own testimony—that he would kill again, if necessary—completely negated any need for a jury instruction on the offense of unintentional killing.¹⁸² The lack of jury instruction constituted harmless error, because the circumstances of the defendant's case would not have warranted jury instruction anyway.¹⁸³

In *Zant v. Stephens*,¹⁸⁴ the Court again upheld a death sentence, despite the incorrect classification of one of its circumstances as a statutory aggravating circumstance.¹⁸⁵ The defendant, who had escaped from a Georgia jail while serving several sentences for numerous robberies, engaged in a crime spree that included an armed robbery, a pair of car thefts, and ultimately, murder.¹⁸⁶ At trial, the prosecution urged conviction based on three aggravating circumstances: first, that the murder defendant had a developed history of criminal assault convictions; second, that this murder involved an aggravated battery to the victim;¹⁸⁷ and third, that the defendant

¹⁷⁶ *Id.* at 607–08, 612 (statute classified a homicide committed in the act of a robbery as a noncapital offense. See ALA. CODE § 13–1–70 (1975)).

¹⁷⁷ 447 U.S. 625, 637–38 (1980).

¹⁷⁸ *Id.*

¹⁷⁹ *Hopper*, 456 U.S. at 613–14.

¹⁸⁰ *Id.* at 610.

¹⁸¹ *Id.*

¹⁸² *Id.* at 612–13.

¹⁸³ *Id.* at 613.

¹⁸⁴ 462 U.S. 862 (1983).

¹⁸⁵ *Id.* at 864. Aggravating circumstances are those which, although beyond the essential requirements for the existence of a particular tort or crime, tend to add to its injurious consequences. BLACK'S LAW DICTIONARY 65 (6th ed. 1990).

¹⁸⁶ *Zant*, 462 U.S. at 864–65.

¹⁸⁷ The defendant murdered the victim by shooting him twice in the head at point blank range. *Id.* at 865.

who committed the murder had escaped from jail.¹⁸⁸ After the trial court convicted the defendant, the Georgia Supreme Court declared that *Arnold v. State*¹⁸⁹ invalidated the first of these aggravating circumstances, dealing with the defendant's criminal history, as "unconstitutionally vague."¹⁹⁰ In *Arnold*, however, no other mitigating circumstances existed.¹⁹¹ The Court considered such error "inconsequential," however, because the jury was correctly allowed to consider the two other circumstances that were statutorily aggravating.¹⁹² Last, in *Barclay v. Florida*,¹⁹³ the state court issued a death sentence based upon statutory aggravating circumstances.¹⁹⁴ Despite later invalidation of one of the circumstances, the Court allowed the state court to uphold the sentence based on harmless error principles.¹⁹⁵

The *Strickland* Court, however, applied a stricter "reasonable probability" standard.¹⁹⁶ The Court held that "[t]he defendant must show that but for counsel's unprofessional errors, *the result of the proceeding would have been different.*"¹⁹⁷ The Court in *Strickland* denied Washington's ineffective assistance of counsel claim on the dual grounds that the defendant failed to establish both deficient performance of counsel and sufficient prejudice.¹⁹⁸

Harmless error analysis has also played a role in post-*Strickland* capital developments as the Court demonstrated in *Satterwhite v. Texas*.¹⁹⁹ In this case, the defendant stood charged with murder allegedly committed during a robbery.²⁰⁰ In an effort to establish the defendant's propensity for future violence, the prosecution submitted into evidence the results of a psychiatric examination, without first informing the defense.²⁰¹ After receiving the death sentence, the defendant appealed, claiming that the prosecution's

¹⁸⁸ *Id.* at 864.

¹⁸⁹ 224 S.E.2d 386 (1976).

¹⁹⁰ *Id.* at 391-92.

¹⁹¹ *Arnold*, 224 S.E.2d at 391.

¹⁹² *Id.* at 888-89.

¹⁹³ 463 U.S. 939 (1983).

¹⁹⁴ *Id.* at 944-45.

¹⁹⁵ *Id.* at 958.

¹⁹⁶ *Strickland*, 466 U.S. 668, 694, *reh'g denied*, 467 U.S. 1267 (1984).

¹⁹⁷ *Id.* (emphasis added); see also Hagel, *supra* note 173, at 211.

¹⁹⁸ *Strickland*, 466 U.S. at 698-700; see also Charles W. Hess, Comment, *Constitutional Law: The Sixth Amendment Right to Effective Assistance of Counsel*, 24 WASHBURN L.J. 360, 374 (1985).

¹⁹⁹ 486 U.S. 249 (1988).

²⁰⁰ *Id.* at 252.

²⁰¹ *Id.* at 254.

action violated his Sixth Amendment right to consult with counsel.²⁰² The *Satterwhite* Court held that the prosecution's action violated the defendant's Sixth Amendment right and, after a harmless error analysis, reversed the death sentence on the ground that it could not say beyond a reasonable doubt that the error did not influence the sentencing jury.²⁰³

The arrival of *Strickland* presented the possibility for uniform standardization of tests for ineffective assistance of counsel. Ostensibly, by subsuming the disparate appellate and state court standards into one consistent, two-pronged test, the Court could ensure that the capital defendant would receive a fair trial, without having to expand the scope of the effective counsel guarantee of the Sixth Amendment. When considered in light of the developments during the 1970s and 80s, however, *Strickland* has not promoted uniform due process fairness, but rather has narrowed the practical scope of the Sixth Amendment.

IV. THE IMPACT OF *STRICKLAND* ON CAPITAL DEFENDANTS

A. *Laying the Foundation: Supreme Court Death Penalty Cases, 1970-84*

The 1970s marked a decade of unparalleled Supreme Court attention to capital punishment proceedings. The interplay between the Court, state judiciaries, and legislatures during that period would shape American death penalty decisions well into the 1980s. The Court set the tone in 1972, when it struck down as unconstitutional three state capital punishment statutes that afforded juries unlimited latitude in deciding when to impose the death sentence.²⁰⁴ The *Furman* Court reasoned that if juries have standardless latitude they could impose the death penalty arbitrarily, in violation of the Constitution.²⁰⁵ As Justice Douglas pointed out in his concurrence, the statutes violated the Constitution in their functioning because they led to the imposition of the death penalty on a disproportionate

²⁰² *Id.* at 251.

²⁰³ *Id.* at 258-60.

²⁰⁴ See *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

²⁰⁵ *Id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

number of poor and minority defendants.²⁰⁶ Such a penalty violates the Eighth Amendment's prohibition of cruel and unusual punishment.²⁰⁷ Thus, the Court established the important principle that the imposition of the death penalty in a careless, undisciplined manner qualifies as cruel and unusual punishment.²⁰⁸

The Supreme Court acted similarly when it vacated the death sentence given to a criminal defendant in *Caldwell v. Mississippi*.²⁰⁹ In that case, prior to closing argument, the prosecution addressed the jury, assuring them that the ultimate responsibility for sentencing the defendant to death rested not with them, but with the appellate court.²¹⁰ Because the appellate court could review their decision, they should not feel inhibited by any pangs of guilt at the prospect of returning a death sentence.²¹¹ Unfortunately for the prosecution, this reassurance not only misstated Mississippi law, but also lowered the jury's collective sense of responsibility for arriving at a death sentence.²¹² Just as the *Furman* Court felt compelled to act to protect the defendant's Eighth Amendment freedom from cruel and unusual punishment, so too did the *Caldwell* Court.²¹³ The possibility, regardless of how slight it may be, that the jury sentenced the defendant to death based on a lack of responsibility violated the standard of reliability required by the Eighth Amendment.²¹⁴

Furman attempted to eliminate arbitrariness from state death penalty schemes. After *Furman*, state response took two forms. Under mandatory death sentencing schemes, death represented the only punishment available for certain offenses, principally first de-

²⁰⁶ *Id.* at 256-57 (Douglas, J., concurring); see also Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 307 (1983). But see *Murray v. Giarratano*, 109 S. Ct. 2765, 2771-72 (1989) (neither Eighth Amendment nor Due Process Clause requires State to appoint counsel for indigent defendants seeking post-conviction relief).

²⁰⁷ *Furman*, 408 U.S. at 312 (White, J., concurring). But see *Murray*, 109 S. Ct. at 2770-71 (neither Eighth Amendment nor Due Process Clause requires distinction between rights of capital and noncapital defendants).

²⁰⁸ See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

²⁰⁹ 472 U.S. 320, 341 (1985).

²¹⁰ *Id.* at 325.

²¹¹ *Id.*

²¹² *Id.* at 330.

²¹³ *Id.* at 341.

²¹⁴ *Id.*; see also *Rogers v. Ohio*, 474 U.S. 1002 (1985) (sentence vacated and case remanded following *Caldwell*); Michael Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283, 292-93 (1989).

gree murder.²¹⁵ The sentencer had no discretion whatsoever, because the option of life imprisonment no longer existed.²¹⁶ Alternatively, guided discretion schemes allowed juries some discretion by permitting a death sentence only in cases that fit particular categories.²¹⁷ With some variations, such statutes provided for separate guilt and sentencing proceedings—known as “bifurcated trials”—and mandated review by the sentencer of all relevant circumstances, both aggravating and mitigating.²¹⁸ The courts encouraged a case-by-case analysis of the circumstances by providing juries with specific guidelines to aid them in their sentencing decisions.²¹⁹

In 1976, the United States Supreme Court ruled on the constitutionality of the mandatory and guided discretion schemes. In the cases of *Woodson v. North Carolina*²²⁰ and *Roberts v. Louisiana*,²²¹ the Court declared that mandatory death sentences violate the capital defendant’s right of protection against cruel and unusual punishment.²²² The Court pinpointed the major constitutional deficiency inherent in the mandatory scheme, namely, rigidity.²²³ Such a statute, the Court reasoned, disregards any attendant circumstances involved in the commission of a crime. Under this rigid scheme, all convicted persons must die. In addition, the Court upheld the right of the criminal defendant to have the jury consider not only the circumstances surrounding the offense, but also the character and record of the individual offender.²²⁴ According to the Court, the Eighth Amendment mandates this consideration as “a constitutionally indispensable part of the process of inflicting the penalty of death.”²²⁵

²¹⁵ See, e.g., *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Rockwell v. Superior Court*, 556 P.2d 1101 (1976) (en banc), *reh’g denied*, L.A. 30645 (Jan. 5, 1977).

²¹⁶ See Goodpaster, *supra* note 206, at 308.

²¹⁷ *Id.*

²¹⁸ See *Gregg v. Georgia*, 428 U.S. 153, 163–64; see also Goodpaster, *supra* note 206, at 310–11.

²¹⁹ See, e.g., *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg*, 428 U.S. 153.

²²⁰ 428 U.S. 280 (1976).

²²¹ 428 U.S. 325 (1976).

²²² *Woodson*, 428 U.S. at 288 (Eighth Amendment mandates that State’s power to punish is “exercised within the limits of civilized standards” (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion))); *Roberts*, 428 U.S. at 336; see also Goodpaster, *supra* note 206, at 308.

²²³ *Woodson*, 428 U.S. at 304.

²²⁴ *Id.*

²²⁵ *Id.*

In contrast to its ruling on the mandatory laws, the Supreme Court upheld the guided discretion statutes.²²⁶ This bifurcated, case-by-case review distinguished the guided discretion statutes from their mandatory counterparts. For example, in *Gregg v. Georgia*, the statute provided a special review procedure that enabled the Georgia Supreme Court to obtain a written report from the trial judge.²²⁷ This report included questions regarding the capability and competence of the defendant's representation.²²⁸ The United States Supreme Court, largely on the strength of these procedural safeguards, upheld the guided discretion statutes and clearly emphasized the need for full disclosure and review of permissible evidence by the sentencer in all capital proceedings.²²⁹

B. Viewing Strickland in Light of Death Penalty and Ineffective Assistance of Counsel Issues

The *Strickland* standard establishes a two-part test for determining the ineffectiveness of defense counsel.²³⁰ First, defendants must prove deficiency of counsel; second, defendants must establish that the deficiency deprived them of their constitutional entitlement to a fair trial by prejudicing the defense.²³¹ The Court intimates that the reasonable probability test places a less onerous burden on the defendant than does the traditional outcome-determinative test.²³² In this manner, to a very limited extent, the post-*Strickland* Court has manifested a commitment to affording increased protection of the capital defendant's Sixth Amendment right to effective counsel.²³³

In *Skipper v. South Carolina*,²³⁴ for example, the State of South Carolina did not allow a convicted murderer and rapist to offer testimony confirming his good behavior while awaiting his sentenc-

²²⁶ See *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

²²⁷ *Gregg*, 428 U.S. at 167.

²²⁸ *Id.* at 167-68 (citing GA. CODE ANN. § 27-2537(a) (Michie 1975)).

²²⁹ See *Jurek*, 428 U.S. at 276. See generally *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion) (case-by-case sentencing is imperative to assure constitutionality of death statutes and sentences alike).

²³⁰ *Strickland v. Washington*, 466 U.S. 668, 687, *reh'g denied*, 467 U.S. 1267 (1984).

²³¹ *Id.* at 693; see also *Hess*, *supra* note 198, at 375.

²³² *Strickland*, 466 U.S. at 693-94; see also *Hagel*, *supra* note 173, at 211.

²³³ See *Skipper v. South Carolina*, 476 U.S. 1 (1986); see also W.S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 183 (1987).

²³⁴ 476 U.S. 1 (1986).

ing hearing in prison.²³⁵ The Supreme Court held that this prohibition violated the defendant's right to present all relevant mitigating evidence prior to the imposition of punishment.²³⁶ By reversing the death sentence,²³⁷ the Court upheld the defendant's right to present mitigating evidence during trial and sentencing proceedings.²³⁸ In *Eddings v. Oklahoma*,²³⁹ the Court once again reversed a death sentence.²⁴⁰ It held that the state, by prohibiting a convicted murderer from introducing evidence of a traumatized childhood, deprived the defendant of his right to the jury's specific consideration of mitigating factors.²⁴¹

The *Skipper* and *Eddings* decisions acknowledge that state and federal courts wield the final authority in deciding what evidence most impacts a circumstantial analysis of a capital offense. Both decisions, however, also feature a Court actively trying to ensure maximum reliability on the validity of death sentences.²⁴² As these decisions illustrate, the Court does not, and will not, defer to the rules or judgments of the lower courts if it sees them as contravening the maximum reliability objective.

Strickland deviates from this trend, however. The *Strickland* Court did not promote the right of the capital defendant over the smooth functioning of the current capital system.²⁴³ Instead, the *Strickland* Court linked the first prong of the standard, the reasonableness standard, with a strong presumption in favor of the attorney's adequate representation.²⁴⁴ Yet, under the reasonableness standard, the success rate for ineffective assistance of counsel claims is extremely low.²⁴⁵

Regarding the second prong, not since *Furman* in 1972 had the Supreme Court based the overturning of a constitutionally ques-

²³⁵ 476 U.S. at 4.

²³⁶ *Id.*; cf. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)).

²³⁷ *Skipper*, 476 U.S. at 8-9.

²³⁸ *Id.* at 8.

²³⁹ 455 U.S. 104 (1982).

²⁴⁰ *Id.* at 117.

²⁴¹ *Id.* at 110-113 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)).

²⁴² See also *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (Court set aside death sentence where defendant was precluded from presenting mitigating evidence not enumerated in Florida State statute).

²⁴³ *Strickland v. Washington*, 466 U.S. 668, 690, *reh'g denied*, 467 U.S. 1267 (1984).

²⁴⁴ *Id.*

²⁴⁵ See Hagel, *supra* note 173, at 211 (citing David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 20-33 (1973); Bines, *supra* note 48, at 927-39; Joel Jay Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1077-81 (1973)).

tionable capital sentence upon a mandatory proving by the defendant of prejudice.²⁴⁶ The *Strickland* Court had no objection to the fact that the harmless error test could allow errors to have a trivial effect on the factual findings at a capital trial.²⁴⁷ The Court posited that the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding."²⁴⁸ Because the fairness of the capital proceeding hinges on the nature of the *entire* range of circumstances and evidence presented at trial, however, it is possible that defense counsel could commit numerous flagrant errors. If indeed the prosecution's damaging evidence sufficiently overrides these errors, a court would most likely find the representation adequate to fulfill the constitutional requirement for effective assistance of counsel because of the defendant's inability to fulfill the second prong of the test.²⁴⁹ As the Court stated, "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."²⁵⁰ This presumption narrows the spectrum of circumstances giving rise to a viable ineffective assistance of counsel action²⁵¹ and simultaneously increases the capital defendant's burden of proof. This presumption creates an inchoate leaning toward the state, which effectively blurs the distinctions between noncapital cases and death penalty trials. It seems only logical that triers of fact also overlook the finality that attaches to capital proceedings, and sets them apart from noncapital criminal trials.

²⁴⁶ Gredd, *supra* note 43, at 1563-64 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Estelle v. Smith*, 451 U.S. 454 (1981)).

²⁴⁷ 466 U.S. at 695-96.

²⁴⁸ *Id.* at 696.

²⁴⁹ Hagel, *supra* note 173, at 212.

²⁵⁰ *Strickland*, 466 U.S. at 691 (quoting *United States v. Morrison*, 449 U.S. 361, 364-65 (1981)).

²⁵¹ See generally *Murray v. Carrier*, 477 U.S. 478, 487-88 (1986) (mere fact that counsel failed to recognize factual or legal basis for a claim, or failed to raise claim after recognizing it, is not *de facto* cause for procedural default); *Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (capital defendant's ineffective counsel claim did not overcome reasonableness prong of *Strickland* standard, or the presumption that defense counsel's challenged action was "sound trial strategy"); *Nix v. Whiteside*, 475 U.S. 157, 164-66, 175-76 (1986) (defendant's Sixth Amendment right to effective assistance of counsel is not violated when attorney refuses to cooperate with defendant in presenting perjured testimony at trial); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (incompetence of defense counsel warrants new trial only if such incompetence influenced outcome of trial (citing *Strickland*, 466 U.S. at 694)). But see *Mintzes v. Wilson*, 469 U.S. 926 (1984); *Wainwright v. Douglas*, 468 U.S. 1206 (1984); *Strickland v. King*, 467 U.S. 1211 (1984) (cases remanded for further consideration pursuant to *Strickland*).

The strong presumption against prejudice that the *Strickland* Court weaved into the prejudice requirement further disadvantages many capital defendants.²⁵² The Court justifies the imposition of this requirement as a means of culling out invalid ineffective assistance claims.²⁵³ Because of the disadvantaged economic position of the majority of capital defendants, most lack the money to obtain the accomplished legal counsel necessary to win an ineffective assistance claim.²⁵⁴ Lacking the funds to retain an attorney sufficiently skilled to overcome the prejudice requirement, the aggrieved defendants effectively forfeit their Sixth Amendment right in the name of judicial economy.²⁵⁵

Furthermore, the Court's decision in *Strickland* contradicted its previous emphasis on the need for higher levels of reliability and analysis in capital proceedings versus noncapital matters.²⁵⁶ In the capital context, the defense counsel and judge rank as the only people standing between the defendant and death. Yet, the *Strickland* Court, in discussing the role of capital counsel, failed to acknowledge the supreme importance of the capital defense attorney over and above the noncapital trial lawyer; the Court turned away from the acknowledgment that the stakes are higher in the capital context.²⁵⁷ The vagueness of the standard, particularly the prejudice requirement, creates a procedural obstacle to the capital defendant, thereby resulting in a life and death distinction based solely upon the quality of the defendant's counsel.²⁵⁸ The Court likewise failed

²⁵² Hagel, *supra* note 173, at 212.

²⁵³ *Strickland*, 466 U.S. at 690; *see also* O'Brien, *supra* note 19, at 735.

²⁵⁴ *Strickland*, 466 U.S. at 690.

²⁵⁵ *See* O'Brien, *supra* note 19, at 735; *see also* Hagel, *supra* note 173, at 212.

²⁵⁶ O'Brien, *supra* note 19, at 737.

²⁵⁷ *Strickland*, 466 U.S. at 687 ("Florida's capital sentencing proceeding need not be distinguished from an ordinary trial").

²⁵⁸ *See, e.g.,* Godfrey v. Kemp, 836 F.2d 1557, 1561, 1571 (11th Cir.), *reh'g denied*, No. 85-8570 (Mar. 1, 1988), *cert. dismissed*, 487 U.S. 1264 (1988) (jury instruction unconstitutionally shifted burden of proof to defendant; death sentence vacated); McCorquodale v. Kemp, 832 F.2d 543, 544-45 (11th Cir.) (per curiam), *cert. denied*, 108 S. Ct. 32 (1987) (defendant's failure to raise objection to constitutionality of sentencing instruction is not excusable; death sentence upheld); Potts v. Kemp, 814 F.2d 1512, 1515-16 (11th Cir. 1987) (error in jury instruction was harmless beyond reasonable doubt, but prosecutor's improper comments during sentencing phase justified granting of temporary habeas corpus relief); Dobbs v. Kemp, 790 F.2d 1499, 1514 (11th Cir. 1986) (capital defendant's counsel was effective); Ross v. Kemp, 785 F.2d 1467, 1477-78 (11th Cir. 1986) (possible negligence on part of defendant's attorneys remanded as jury question); Bowen v. Kemp, 769 F.2d 672, 680-83 (11th Cir. 1985) (prosecutor's questionable conduct constituted harmless error); Young v. Zant, 727 F.2d 1489, 1492-93 (11th Cir. 1984) (capital defendant's counsel, despite using drugs during trial and failing to investigate possible line of defense, did not sink to level of unconstitutional ineffectiveness).

to reconcile this line of thinking with the heightened reliability directive in *Eddings*.²⁵⁹

Finally, the *Strickland* decision contains qualifiers on the scope of its effect that limit its force in promoting national uniformity of standards. Shortly after its issuance, some members of the legal community hailed the *Strickland* standard as a "uniform framework for analyzing ineffectiveness claims."²⁶⁰ In bringing all of the diverse regional standards under the aegis of one proper standard for analyzing attorney performance, these commentators claimed that *Strickland* would enable trial courts to adjudicate Sixth Amendment cases more reliably.²⁶¹

While the Court wishes to ensure the reliability of death sentences, it fails to utilize the *Strickland* standard as an instrument to accomplish this goal. As Justice O'Connor writes for the majority:

In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, *the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards*. . . . In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts imposes a heavier burden on defendants than the tests laid down today. *The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.*²⁶²

Thus, the Court placed definite limits on the scope of the *Strickland* standard and tacitly endorsed the status quo—a multiplicity of lower court standards for measuring counsel effectiveness.

To an extremely limited extent, the expectations of uniformity surrounding the *Strickland* standard have come to fruition. In *Her-*

²⁵⁹ Cf. *Bullington v. Missouri*, 451 U.S. 430 (1981); *Beck v. Alabama*, 447 U.S. 625 (1980); *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam); *Lockett*, 438 U.S. 586 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

²⁶⁰ Mermelstein, *supra* note 47, at 662.

²⁶¹ See *id.*

²⁶² *Strickland*, 466 U.S. at 696–97 (citation omitted) (emphasis added).

nandez v. State,²⁶³ the Court of Criminal Appeals of Texas adopted the *Strickland* test as the official standard for ineffective assistance of counsel claims under the constitution of that state.²⁶⁴ Three years later, the same court upheld a death sentence in *Derrick v. State*,²⁶⁵ on the ground that the defense counsel's failure to object to the prosecutor's hypothetical statements did not fall below *Strickland's* reasonableness standard.²⁶⁶

To date, only two *Strickland* challenges have emerged victorious in the Louisiana court system. In *State v. Ball*,²⁶⁷ the defendant was charged with second degree murder.²⁶⁸ During trial, the defense attorney failed to object to an incorrect jury instruction for second degree murder.²⁶⁹ In addition, the defense lawyer himself erroneously told the jury that they could convict his client based on this incorrect instruction.²⁷⁰ In performing a *Strickland* analysis, the Court of Appeal of Louisiana held that counsel's errors easily rendered his performance deficient under the Sixth Amendment, and that the deficient representation caused prejudice to inure to the

²⁶³ 726 S.W.2d 53 (Tex. Crim. App. 1986) (en banc).

²⁶⁴ *Id.* at 56-57; see also *Morrison v. State*, 795 S.W.2d 276, 280 (Tex. Ct. App. 1990); *Kinnamon v. State*, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990) (en banc), *reh'g denied*, No. 69531 (June 27, 1990); *Talamantez v. State*, 790 S.W.2d 33, 37 (Tex. Ct. App. 1990), *reh'g denied*, No. 04-88-00581-CR (Apr. 11, 1990); *Gaynor v. State*, 788 S.W.2d 95, 98-99 (Tex. Ct. App. 1990), *reh'g denied*, No. C14-89-270-CR (Mar. 22, 1990), *dis. rev. ref.* (June 27, 1990); *Doles v. State*, 786 S.W.2d 741, 745-47 (Tex. Ct. App. 1989); *Burnett v. State*, 784 S.W.2d 510, 513-15 (Tex. Ct. App. 1990), *dis. rev. ref.*, No. 05-89-00048-CR, 05-89-00049 - CR (Apr. 4, 1990); *Alfano v. State*, 780 S.W.2d 494, 495-96 (Tex. Ct. App. 1989); *Salinas v. State*, 773 S.W.2d 779, 782-83 (Tex. Ct. App. 1989); *Washington v. State*, 771 S.W.2d 537, 545 (Tex. Crim. App. 1989) (en banc), *cert. denied*, 109 S. Ct. 3229 (1989); *Ex parte Adams*, 768 S.W.2d 281, 290 (Tex. Crim. App. 1989) (en banc); *Medford v. State*, 766 S.W.2d 398, 399 (Tex. Ct. App. 1989), *reh'g denied*, No. 3-87-221-CR (Apr. 5, 1989); *Holland v. State*, 761 S.W.2d 307, 314 (Tex. Crim. App. 1988), *reh'g denied*, No. 69647 (Oct. 19, 1988), *cert. denied*, 109 S. Ct. 1560 (1989); *Fair v. State*, 758 S.W.2d 898, 899 (Tex. Ct. App. 1988); *Smith v. State*, 742 S.W.2d 847, 849 (Tex. Ct. App. 1987).

²⁶⁵ 773 S.W.2d 271 (Tex. Crim. App.) (en banc), *reh'g denied*, No. 68969 (May 10, 1989), *cert. denied*, 110 S. Ct. 209 (1989).

²⁶⁶ *Id.* at 275; see also *Derrick v. Collins*, 741 F. Supp. 126, 129 (S.D. Tex. 1990) (defense counsel's decision to enter unedited transcript of defendant's murder confession into evidence was "tactical decision" and did not satisfy first prong of *Strickland* test); *Solis v. State*, 792 S.W.2d 95, 98-100 (Tex. Crim. App. 1990) (en banc) (defendant's ineffectiveness claim fails under *Strickland* analysis); *Toney v. State*, 783 S.W.2d 740, 742 (Tex. Ct. App. 1990), *dis. rev. ref.*, No. 08-88-00233-CR (Apr. 11, 1990) (defendant fails to satisfy *Strickland* test); *Lavigne v. State*, 782 S.W.2d 253, 256 (Tex. Ct. App. 1989) (defendant was not deprived of effective counsel).

²⁶⁷ 554 So. 2d 114 (La. Ct. App. 1989).

²⁶⁸ *Id.* at 115.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

defendant.²⁷¹ In a second case, *State ex rel. Busby v. Butler*,²⁷² the Supreme Court of Louisiana affirmed a defendant's murder conviction, but vacated the death sentence.²⁷³ The defendant failed to show that counsel's conduct during the guilt phase of the trial²⁷⁴ prejudiced his defense.²⁷⁵ During sentencing, however, the court found that counsel had indeed represented the defendant ineffectively.²⁷⁶ Counsel's failure to make an opening statement, his failure to challenge any argument of the prosecution's case, and his failure to introduce any mitigating evidence rendered his representation below the *Strickland* allowance and justified a vacated sentence.²⁷⁷

On the federal level, the Fifth Circuit applied the *Strickland* standard in *Hawkins v. Lynaugh*.²⁷⁸ The court conceded that the capital defendant could have been deprived of effective assistance of counsel.²⁷⁹ At trial, Texas capital sentencing procedures effectively barred the defendant from presenting mitigating evidence of mental illness and an adverse childhood.²⁸⁰ Defense counsel failed to object to this exclusion and likewise failed to preserve the objection for later review.²⁸¹ This failure constituted the basis of the defendant's ineffectiveness claim.²⁸² After performing a *Strickland* analysis, the Fifth Circuit concluded that the defendant did indeed have valid grounds for challenging the sentence.²⁸³ In another case, however, the Fifth Circuit refused to uphold a capital defendant's ineffective counsel challenge in *Graham v. Lynaugh*,²⁸⁴ largely on the ground that the trial court had defeated each of the defendant's allegations, ranging from failure to present certain mitigating evidence to failure to provide the defendant with proper attire during trial.²⁸⁵ The *Strickland* standard also appeared in *Riles v. McCotter*,²⁸⁶

²⁷¹ *Id.* at 116-17.

²⁷² 538 So. 2d 164 (La. 1988).

²⁷³ *Id.* at 174-75.

²⁷⁴ During jury selection, counsel failed to question prospective jurors about their stances on capital punishment; counsel also failed to pursue an insanity defense and neglected to obtain psychiatric testimony to substantiate such a defense. *Id.* at 168.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 173.

²⁷⁷ *Id.*

²⁷⁸ 862 F.2d 482 (5th Cir. 1988) (per curiam).

²⁷⁹ *Id.* at 486-87.

²⁸⁰ *Id.* at 486.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 487.

²⁸⁴ 854 F.2d 715 (5th Cir. 1988).

²⁸⁵ *Id.* at 721-22 (each of defendant's allegations rejected).

²⁸⁶ 799 F.2d 947 (5th Cir. 1986).

in which the Fifth Circuit referred to it as "[t]he two-part constitutional standard governing effectiveness of counsel,"²⁸⁷ but held that the capital defendant's lawyer did not act deficiently, because the actions of the trial court to which he failed to object were later held proper on appeal.²⁸⁸

For the most part, however, the *Strickland* Court's reluctance to interfere with the smooth functioning of the current capital punishment system has considerably weakened its effectiveness in leading the lower courts and preserving the constitutional right to effective counsel.²⁸⁹ As the Court noted, "[c]ourts should strive to ensure that ineffectiveness claims do not become so burdensome to defense counsel that the entire criminal justice system suffers as a result."²⁹⁰ The Court's concern for streamlining the system weakens what could have been a forceful national precedent. Instead, the Court stated that, "in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules . . . the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."²⁹¹ Through its incorporation of a vague performance standard, a burdensome actual prejudice standard, and a tentative scope of application, the *Strickland* Court has done little to foster uniformity among the nation's courts, and instead has left the capital defendant's Sixth Amendment right at the mercy of prevailing regional interpretation.²⁹²

Since *Strickland*, the success rate for capital defendants bringing ineffective assistance of counsel claims has been low at every level of the federal and state judiciaries. Not one ineffective assistance of counsel claim has led to the overturning of a death sentence by the Supreme Court since 1984. In *Bonin v. California*,²⁹³ the Court declined to issue a writ of certiorari to a capital defendant who alleged that his counsel was compromised by a conflict of interest.²⁹⁴ The fact that a human life hung in the balance did not persuade the majority that the defendant's counsel, who had secured the literary rights to his client's life story prior to the commencement of the

²⁸⁷ *Id.* at 954.

²⁸⁸ *Id.* at 954-55.

²⁸⁹ See WHITE, *supra* note 233, at 183.

²⁹⁰ *Strickland v. Washington*, 466 U.S. 668, 697, *reh'g denied*, 467 U.S. 1267 (1984).

²⁹¹ *Id.* at 696.

²⁹² See O'Brien, *supra* note 19, at 732.

²⁹³ 110 S. Ct. 1506 (1990) (Marshall, J., dissenting).

²⁹⁴ *Id.* (Marshall, J., dissenting).

trial, could have been adversely affected professionally by this conflict.²⁹⁵ In *Laws v. Armontrout*,²⁹⁶ the capital defendant claimed that counsel failed to offer any mitigating evidence at trial, despite the attorney's knowledge of the defendant's honorable military service in Vietnam.²⁹⁷ Still, the Court remained unconvinced and denied a writ of certiorari.²⁹⁸ In some cases, the harmless error rule has terminated ineffectiveness of counsel claims. In *Thomas v. Kemp*,²⁹⁹ for example, the Court held that the capital defendant's denial of counsel at his preliminary hearing did not substantially prejudice his case.³⁰⁰

Challenges alleging inadequate preparation of counsel have also fared poorly before the Court.³⁰¹ In *Kimmelman v. Morrison*,³⁰² the Court found a defendant's ineffective assistance claim to have merit under the first prong of the *Strickland* test—for failure to file a motion to suppress evidence³⁰³—but invalidated the challenge using the prejudice prong, finding that the defense counsel's incompetence did not prejudice his client's case.³⁰⁴

At the federal appellate level, the success rate to date for capital defendants bringing ineffective assistance of counsel claims has been three percent in the Fifth Circuit—one claim won, thirty-one denied—and twenty-five percent in the Eleventh Circuit—fourteen claims won, forty-one denied.³⁰⁵ Moreover, the Southern state courts have shown no more receptiveness to such claims.³⁰⁶ The Florida Supreme Court has found counsel ineffective in only nine cases since 1984;³⁰⁷ Georgia, in only three;³⁰⁸ Louisiana, in two; Alabama, in one; and the Texas Supreme Court has never ruled in

²⁹⁵ *Id.* at 1506–07; (Marshall, J., dissenting); see also *Burger v. Kemp*, 483 U.S. 776, 783–88, *reh'g denied*, 483 U.S. 1056 (1987).

²⁹⁶ 490 U.S. 1040 (1989) (Marshall, J., dissenting).

²⁹⁷ *Id.* at 1041 (Marshall, J., dissenting).

²⁹⁸ *Id.* at 1040 (Marshall, J., dissenting); see also *Messer v. Zant*, 487 U.S. 1244 (1988) (Marshall, J., dissenting); *Mitchell v. Kemp*, 483 U.S. 1026 (1987) (Marshall, J., dissenting).

²⁹⁹ 479 U.S. 996 (1986) (Marshall, J., dissenting).

³⁰⁰ *Id.* at 998 (Marshall, J., dissenting).

³⁰¹ See, e.g., *Maxwell v. Florida*, 479 U.S. 972, 975–76 (1986) (Marshall, J., dissenting) (trial counsel's failure to provide defendant with work files not seen as deficient); *Aldrich v. Wainwright*, 479 U.S. 918–19, 922 (1986) (Marshall, J., dissenting) (inadequate preparation did not render counsel ineffective).

³⁰² 477 U.S. 365 (1986).

³⁰³ *Id.* at 383–87.

³⁰⁴ *Id.* at 387–91.

³⁰⁵ Lavelle & Coyle, *supra* note 22, at 42.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ See Paul Marcotte, *Snoozing, Unprepared Lawyer Cited*, 77 A.B.A. J. 14, 16 (1991).

favor of the defendant.³⁰⁹ The Georgia case of *Ross v. Kemp*³¹⁰ ranks as an especially disturbing example of the level to which attorney conduct must sink before the court will find counsel ineffective. Here, an aged³¹¹ defense lawyer, who served as an imperial wizard in the Ku Klux Klan, represented a black defendant in a capital case.³¹² The lawyer's representation contained numerous flagrant examples of ineffectiveness. Counsel fell asleep during discovery, failed to prepare his client for direct and cross-examinations, and directly contradicted defenses established by co-counsel.³¹³ In reversing the death penalty conviction, the Supreme Court of Georgia found that the representation violated the defendant's Sixth and Fourteenth Amendment rights to effective assistance of counsel, and that such violation was particularly impermissible "in a trial in which [the defendant's] life hung in the balance."³¹⁴ Although the *Strickland* standard was heralded as a promoter of uniformity and a safeguard of the capital defendant's right to counsel, these figures indicate that the defendant virtually never wins.³¹⁵

Justice Antonin Scalia, the newly assigned administrative justice for the Fifth Circuit, has further complicated the dilemma for capital defendants. In a recent ruling, Justice Scalia announced that a defendant's lack of counsel no longer constitutes "good cause" for a time extension for filing a writ of certiorari in death penalty cases.³¹⁶ Currently, capital defendants have ninety days in which to file a writ after the finalization of the judgment of the state court of appeals.³¹⁷ This ruling could prompt an increase in allegations of ineffective assistance of counsel, for both short and long-term reasons. In the short-term, capital defense attorneys foresee this ruling as leading to an increase in hastily prepared habeas petitions and, in cases in which defendants have lost their lawyers after the

³⁰⁹ Lavelle & Coyle, *supra* note 22, at 42.

³¹⁰ 393 S.E.2d 244 (Ga. 1990) (per curiam).

³¹¹ *Id.* at 245.

³¹² Marcotte, *supra* note 308, at 14.

³¹³ *Ross*, 393 S.E.2d at 245.

³¹⁴ *Id.* at 246.

³¹⁵ One source places the number of ineffective assistance claims handled by the federal circuit courts of appeals since the *Strickland* decision at 702, as of May 30, 1988. Of this number, the courts have found ineffective assistance under the standard in only 30 cases, or 4.27%. See Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 458 (1988).

³¹⁶ Marsha Coyle & Marianne Lavelle, *Chilling Capital Appeals*, NAT'L L.J., Mar. 11, 1991, at 1.

³¹⁷ *Id.* at 24.

initial loss at trial, no petitions at all.³¹⁸ Furthermore, over the long-term, the ruling could discourage volunteer attorneys—who handle many capital cases on the condition that they receive adequate time to prepare—from taking such cases.³¹⁹ As a result, this ruling could increase the number of ineffectiveness claims adduced by drastically reducing the available pool of attorneys competent to handle them.

V. CONCLUSION

During the 1970s, the Supreme Court took perhaps its most forceful steps toward actively regulating our current system of capital punishment. Its landmark decisions in *Roberts v. Louisiana*,³²⁰ and *Woodson v. North Carolina*,³²¹ which invalidated mandatory death statutes, and those in *Jurek v. Texas*,³²² *Proffitt v. Florida*,³²³ and *Gregg v. Georgia*,³²⁴ which allowed for the guided discretion versions, set the stage for a system that the Court hoped would “operate more fairly and less arbitrarily than the old system of capital punishment.”³²⁵ Despite this objective, however, federal and state courts, in the absence of a clearly defined national standard, continued to apply their own variants of the “reasonable attorney” rule. The 1982 *Eddings* decision exemplified the Court’s acknowledgment of the distinction between capital and noncapital cases and announced its pledge to ensure that death sentences would issue only after heightened reliability and careful presentation and evaluation of all attendant circumstances so dictated.

In theory, the basic holding of the *Strickland* decision—that the correct standard for analyzing attorney performance is reasonably effective assistance, after a consideration of the totality of circumstances of the case³²⁶—does indeed appear to safeguard the capital defendant’s Sixth Amendment right.³²⁷ In practice, however, the *Strickland* standard, because it is comprised of a vague reasonable-

³¹⁸ *Id.* at 1.

³¹⁹ *Id.*

³²⁰ 428 U.S. 325 (1976).

³²¹ 428 U.S. 280 (1976) (plurality opinion).

³²² 428 U.S. 262 (1976).

³²³ 428 U.S. 242 (1976).

³²⁴ 428 U.S. 153 (1976).

³²⁵ WHITE, *supra* note 233, at 20.

³²⁶ *Strickland v. Washington*, 466 U.S. 668, 686, 690, *reh’g denied*, 467 U.S. 1267 (1984).

³²⁷ *Id.* at 688.

ness standard and a difficult-to-prove actual prejudice requirement, has not delivered on the promise. Instead, the Court has succeeded only in shifting the burden of preserving the capital defendant's right to effective assistance of counsel from the capital system itself, to the shoulders of the defendant.

Richard P. Rhodes, Jr.

